

SERVED: December 18, 1996

NTSB Order No. EA-4505

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 4th day of December, 1996

_____)	
LINDA HALL DASCHLE,)	
Acting Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-14249
v.)	
)	
JAMES B. OLIVER,)	
)	
Respondent.)	
_____)	

OPINION AND ORDER

The Administrator has appealed from the oral initial decision of Administrative Law Judge William R. Mullins, issued on March 21, 1996, following an evidentiary hearing.¹ The law judge affirmed an order of the Administrator suspending respondent's airman certificate, on finding that

¹ The initial decision, an excerpt from the hearing transcript, is attached.

respondent had violated 14 C.F.R. 91.13(a) in connection with flights in which he was the pilot-in-command of a Boeing 727-100 operated in Part 121 revenue service for Av Atlantic.² The law judge, however, reduced the Administrator's 30-day proposed suspension to one of 7 days. We deny the Administrator's appeal.³

The facts of this case are not in dispute. Respondent piloted Av Atlantic's first two (passenger-carrying charter) flights in this aircraft. Apparently, use of the aircraft had been approved by the FAA, although Av Atlantic did not have correct weight and balance (W/B) manifest forms. Absent the proper forms, the crew did not have the documentation necessary to calculate the center of gravity correctly, and the prescribed horizontal stabilizer trim could not be determined. On the flights, respondent used forms for a 727-200. He knew they were the wrong forms, raised the issue with the company, and was told to fly anyway. Respondent believed the aircraft was properly loaded (as he had witnessed the loading), and there was no

² Section 91.13, **Careless or reckless operation**, reads:

(a) Aircraft operations for the purpose of air navigation. No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another.

³ Respondent, who is representing himself, filed no reply to the appeal.

evidence introduced that would indicate that there were any problems with the takeoffs or the rest of the flights.⁴ Further, there was testimony that the chief pilot at Av Atlantic, Mr. Robert Moore (who testified at the hearing), was fired for discussing the problem of the wrong form with an FAA ramp inspector, and respondent feared the same treatment had he refused to fly the aircraft. (Respondent ultimately did refuse to fly a third flight 5 days after the second flight, and the form problem was corrected. Respondent testified that he resigned his position with the carrier based on its unwillingness to "stand behind" the pilots. Tr. at 84.)

In reducing the suspension, the law judge noted the above facts, and also acknowledged evidence in the record indicating that the FAA had not taken enforcement action against the carrier in this matter. On appeal, the Administrator argues that it was error, and inconsistent with Board precedent, for the law judge to consider the fact that no enforcement action had been taken against the company (and that this testimony, allowed over the Administrator's objection, should be stricken from the record). Although we agree with the Administrator that precedent supports his argument that the FAA's choice in

⁴ Respondent stated that, for the 727-200, the trim would have been 10 degrees nose up, and they set the 727-100 at 6 (footnote continued ...)

prosecution is not a matter for the Board to consider, we need not address this issue directly as the law judge's consideration of this matter is, at most, harmless error.⁵

The law judge considered many factors in addition to the one on which the Administrator focuses, in deciding to reduce the sanction. The initial decision indicates that the law judge also considered: respondent's attempts to correct the problem; respondent's belief, shared by his second officer and based on considerable aviation experience, that there was actually no weight and balance problem, confirmed in testimony from Mr. Moore and unrebutted by the Administrator; and respondent's conviction that he would be fired if he had declined to proceed with the flights. The law judge had also heard unrebutted evidence (Tr. at 69-70) that the stabilizer trim setting respondent had used was in the "green band," and therefore, safe.

Ultimately, the question before us is whether the law judge abused his discretion in reducing the sanction to a 7-

(... footnote continued)
degrees.

⁵ It is troubling enough that the law judge would intrude on a matter of the Administrator's prosecutorial discretion that our precedent clearly instructs him to avoid. What is worse is his willingness to do so without a complete record; namely, one that includes the respondent's employer's account of the matter and the Administrator's reasons for his determination on whom to sanction in the case.

day suspension. On this record, we cannot find that he did. To look at it another way, on appeal the Administrator must demonstrate that we are required to impose his sought 30-day suspension.

We look first at the consistency of the sanction with precedent. The Administrator offers us little assistance in this regard, citing in his appeal brief no cases supporting a longer suspension period. In closing argument, counsel cited two cases, both of which are easily distinguished. Administrator v. Schoppaul, 7 NTSB 1195 (1991), involved a fatal accident in an unairworthy aircraft. Respondent there admitted, as pertinent here, that the aircraft was heavier than the weight and balance form indicated. The crew had failed to take various, relatively obvious actions (like failing to consider the weight of considerable carry-on baggage). Administrator v. Daniel, NTSB Order No. EA-4346 (1995), also involved a fatal accident, where the pilot unreasonably assumed a passenger weight unreasonably low, and took off overweight and with no valid medical certificate.

These cases, with their considerably different facts, offer no guidance in the matter of sanction in the case before us. Most different about the three fact patterns is that, in the case before us, the Administrator did not establish that respondent's actions resulted in an unsafe or

unairworthy aircraft. Ultimately, the trim stabilizer was set acceptably, and the Administrator did not prove there was an actual weight and balance problem with the aircraft. Thus, while respondent does not appeal the law judge's finding that his action in operating the aircraft without the proper forms and without the proper W/B determinations violated § 91.13(a), we cannot find the law judge was wrong in concluding that respondent's action does not merit a 30-day suspension.

Pursuant to 49 U.S.C. 44703(c)(2), the Board is also generally bound by the Administrator's "validly adopted interpretations of laws and regulations," which includes the Administrator's sanction guidance table. However, the Administrator has introduced absolutely no evidence regarding any applicable or relevant sanction guidance that would contradict the law judge's 7-day suspension.

The range of sanctions for violating § 91.13(a) is extremely broad, and it depends on the particular facts of each case. The Administrator has failed to present convincing evidence or argument to increase the sanction imposed by the law judge.⁶

⁶ Indeed, another factor that would mitigate the sanction is the FAA's own failure, when it approved the 727-100 aircraft for AV Atlantic passenger service, also to require and ensure (through review of operating manuals) that AV Atlantic have and use the correct 727-100 W/B information and forms.

ACCORDINGLY, IT IS ORDERED THAT:

1. The Administrator's appeal is denied; and
2. The 7-day suspension of respondent's airline transport pilot certificate shall begin 30 days from the date of service of this order.⁷

HALL, Chairman, FRANCIS, Vice Chairman, HAMMERSCHMIDT, GOGLIA, and BLACK, Members of the Board, concurred in the above opinion and order.

⁷ For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to Federal Aviation Regulation section 61.19(f).